IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs September 19, 2007

STATE OF TENNESSEE v. JOSEPH RAY EVANS

Appeal from the Criminal Court for Davidson County
No. 2006-A-397 Seth Norman, Judge

No. M2006-02748-CCA-R3-CD - Filed January 9, 2008

The Appellant, Joseph Ray Evans, appeals the sentencing decision of the Davidson County Criminal Court. Under the terms of an "open" plea agreement, Evans pled guilty to attempted aggravated sexual battery, a Class C felony, and received the minimum sentence of three years, suspended, to be followed by six years of supervised probation. On appeal, Evans argues that the trial court's imposition of six years probation instead of three years was error. Following review of the record, we find no error and affirm the sentence as imposed.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed

DAVID G. HAYES, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

Mike J. Urquhart, Nashville, Tennessee, for the Appellant, Joseph Ray Evans.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; Victor S. Johnson III, District Attorney General; and Hugh Garrett, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

The relevant underlying facts of the case, as recited in the pre-sentence report, are as follows:

> In September 2005, victim [M.M.[1]] was in therapy for behavioral problems including viewing pornography. When asked if he had ever been touched, he disclosed that [the Appellant] . . . had touched him when he was younger. . . .
>
> During his forensic interview, the victim stated that when he was about five years old, [the Appellant] was living in his home as a guest of his father. One day the victim came home from school while his father was still at work and was watching cartoons in his bedroom. [The Appellant] entered the victim's bedroom, pulled down the victim's pants and underwear, and fondled the victim's penis and buttocks with his hands. The victim was not made to touch [the Appellant], and [the Appellant] told him not to tell anyone about what had happened.
>
> The victim indicated that when he was about 6 or 7 years old, [the Appellant] showed him a pornographic movie in the living room; he did not disclose any further sexual activity taking place at that time.

Following questioning by the police, the Appellant admitted to two separate instances of sexual contact with the victim. The Appellant was eighteen years of age at the time of the crimes.

On February 14, 2006, a Davidson County grand jury returned an indictment charging the Appellant with two counts of aggravated sexual battery. On October 12, 2006, the Appellant pled guilty, pursuant to an open plea agreement, to one count of attempted aggravated sexual battery, a Class C felony. As part of the agreement, the remaining count of the indictment was dismissed. A sentencing hearing was held on December 6, 2006, at which the Appellant and a licensed clinical psychologist testified.

Dr. Bill Anderson testified that he had conducted a psychosexual evaluation of the Appellant and found him to be open and communicative. He noted that the Appellant expressed a desire to change his current homosexual lifestyle because his present lifestyle had only "gotten him into trouble." Dr. Anderson further noted that the Appellant had disclosed a difficult upbringing and indicated that the Appellant had been molested as a seven-year-old child. Dr. Anderson was of the opinion that the Appellant needed "transitional housing" or placement in a "structured environment," coupled with the type of counseling which is "offered through the Probation Department." If provided, Dr. Anderson opined that the risk of the Appellant re-offending was low.

The Appellant, who was twenty-five years old at the time of the sentencing hearing, testified regarding his disruptive home environment as a youth and the molestation by his mother's boyfriend's son. He also agreed to undergo counseling as a condition of his probation. The pre-sentence report established that the Appellant had no prior criminal history, was a high school graduate, and had a stable work background.

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[1] It is the policy of this court to identify minor victims of sexual abuse by their initials. *State v. Schimpf*, 782 S.W.2d 186, 188 n.1 (Tenn. Crim. App. 1989).

After hearing the evidence presented, the trial court denied the Appellant's request for judicial diversion and sentenced the Appellant to a three-year suspended sentence followed by six years of probation. The Appellant timely appeals the sentencing decision.

Analysis

On appeal, the Appellant asserts that the trial court's imposition of six years probation instead of three was error. The Appellant acknowledges that he suggested that the court place him on probation for a period of six years if the court granted him judicial diversion. However, according to the Appellant, since the court did not place him on judicial diversion, it had no basis for a sentence of six years probation and should have ordered only three years.

When an accused challenges the length, range, or the manner of service of a sentence, this court has a duty to conduct a *de novo* review of the sentence with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2003); *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *Ashby*, 823 S.W.2d at 169. The burden is on the Appellant to show that the sentencing was improper. T.C.A. § 40-35-401, Sentencing Comm'n Cmts.

When conducting a *de novo* review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the pre-sentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the Appellant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103, -210 (2003); *Ashby*, 823 S.W.2d at 168. Furthermore, we emphasize that facts relevant to sentencing must be established by a preponderance of the evidence and not beyond a reasonable doubt. *State v. Winfield*, 23 S.W.3d 279, 283 (Tenn. 2000) (citing *State v. Poole*, 945 S.W.2d 93, 96 (Tenn. 1997)).

The Appellant was convicted, as a Range I offender, of attempted aggravated sexual battery, a Class C felony, which carries a sentencing range of three to six years. T.C.A. § 40-35-112(a)(3) (2003). As applicable to this case, the presumptive sentence to be imposed by the trial court for the Appellant's Class C felony conviction is the minimum sentence within the applicable range unless there are enhancement or mitigating factors present. T.C.A. § 40-35-210(c).[2]

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[2] Effective June 7, 2005, Tennessee Code Annotated sections 40-35-114 and 40-35-210 were rewritten in their entirety. *See* 2005 Tenn. Pub. Acts, ch. 353, §§ 5, 6. Pursuant to the amended sections, the enhancement factors are now advisory only. *See* T.C.A. §§ 40-35-114 (2006) ("[T]he court shall consider, but is not bound by, the following advisory factors in determining whether to enhance a defendant's sentence"); -35-210(c) ("In imposing a specific sentence within the range of punishment, the court shall consider, but is not bound by, the following advisory sentencing guidelines."). These provisions are not applicable to the Appellant, however, as his crime was committed between June 8, 1999, and December 31, 2001, and no "waiver of . . . [Appellant's] ex post facto protections" is included in the record before us.

(continued...)

The trial court in this case imposed a sentence of three years because no enhancement factors were present, and the Appellant does not challenge the length of the sentence. The court then suspended that sentence and imposed an additional six- year probationary term. However, according to the Appellant, because the court did not find any enhancing factors, it was without authority to order a probationary period over three years. The Appellant's argument is misplaced as he appears to confuse the sentence range for confinement with the permissible term of probation for the class of the offense. In essence, the Appellant is arguing that the presumptive minimum of the sentence range also applies to the period of probation. However, there is no requirement that the duration of probation be the same as the length of the sentence imposed. T.C.A. § 40-35-303(c) (2003), Sentencing Comm'n Cmts.

Tennessee Code Annotated section 40-35-303(c)(1) governs the eligibility and terms of sentences involving probation and states, in pertinent part, that:

> If the court determines that a period of probation is appropriate, the court shall sentence the defendant to a specific sentence but shall suspend the execution of all or part thereof and place the defendant on supervised or unsupervised probation either immediately or after a period of confinement for a period of time no less than the minimum sentence allowed under the classification and up to and including the statutory maximum time for the class of the conviction offense.

The Sentencing Commission comments provide that "even though the length of the actual sentence is restricted to that required by the particular range, the judge may fix the length of probation up to the statutory maximum for the class of the offense[,]" thus, authorizing a trial court to impose a lengthier probation period for a defendant than the actual imposed sentence. *Id*., Sentencing Comm'n Cmts. Moreover, trial courts are given much latitude in fixing the length of probation. *State v. Brian Necessary*, No. 02C01-9307-CR-00131 (Tenn. Crim. App. at Jackson, Aug. 10, 1994).

The maximum penalty for the Appellant's Class C felony is fifteen years. T.C.A. § 40-35-112(c)(3). Thus, because the court imposed a six-year probationary term in this case, the sentence is authorized under the statute. The record demonstrates that the trial court, in ordering the six-year term, considered all the relevant factors and principles of sentencing. In imposing the term of supervised probation, the trial court noted, "Now I can understand how his family feels, but I think the public is going to be safer if I put him on probation for six years if you want to know the truth." Clearly, protection of the public is a relevant factor in every sentencing decision, particularly in those cases where there is a risk that the offender will re-offend. The forensic psychological evaluation by Dr. Anderson, which was filed as an exhibit in this case, noted that the Appellant's test results reflected "elevations" with regard to the Schizophrenic Scale, Scale 8, and the Psychopathic Deviate Scale, Scale 4. The evaluation concluded:

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[2](...continued)
See T.C.A. § 40-35-114, Compiler's Notes.

> With this pattern of an elevated Scale 8 and Scale 4, there has been significant research over the years on these scales and their pattern. People with this pattern tend to be unpredictable and odd in appearance and shape. They tend to see the world as threatening and respond either with withdrawing or lashing out in anger. People with this pattern tend to get into trouble because they have poor judgment.

The trial court obviously placed great weight on the testimony of Dr. Anderson that the Appellant needed to be in a structured environment with counseling. Our review of the record reveals that the Appellant has failed to meet his burden of establishing that the six-year period of probation is excessive.

CONCLUSION

Based upon the foregoing, the sentencing decision of the Davidson County Criminal Court is affirmed.

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DAVID G. HAYES, JUDGE